Supreme Court, U.S.
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No.

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In The

Supreme Court of the United States

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Jon Zavalidroga

v.

United States

On Petition For Writ Of Certiorari To
The United States Court of Appeals For
The Ninth Circuit

Prepared by:

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## THE QUESTIONS FOR REVIEW

In attempts to have a criminal conviction reversed, the out-of-custody defendant pro se has progressively developed his claim in a complex series of submissions which began with two successive district court petitions followed by a first Ninth Circuit appeal; thereafter followed by a third district court petition with the attendant second Ninth Circuit appeal; thereafter followed by a petition for certiorari to the Supreme Court; thereafter followed by a fourth district court petition with a third Ninth Circuit appeal.

At the time of the third Ninth Circuit appeal, the Government prosecution, for its first time ever, introduced a "law of the case" argument to contend that the defendant's case had been decided at some previous moment. The Ninth Circuit's split-panel denial of habeas relief is the basis of the three issues for the Supreme Court:

(1) The Government would have firstly forever-after waived its "law of the case" defense when the Government failed to promptly raise its defense either immediately after the time of Zavalidroga's second district court petition or even at the time of the second Ninth Circuit appeal.

(2) The Congressional intent of 28 U.S.C. 2255(4) is to purposefully override any prior case determinations in the same case which have already been made under 28 U.S.C. 2255(1).

(3) The Ninth Circuit has disregarded the Supreme Court's precedents which have developed the federal miscarriage-of-justice rule that pertains to those habeas petitioners who are seeking to prove their factual innocence.

## PARTIES TO PROCEEDING

1) The federal prosecutor in District Court Case #CR-96-0146 MMC:

Karen Beausey
U.S. Attorney's Office
450 Golden Gate Avenue
P.O. Box 36055
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2) The district court in which trial docket #CR-96-0146 was held:

Honorable Maxine Chesney
United States District Court
for the Northern District of California
450 Golden Gate Avenue
San Francisco, California 94102

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## STATEMENT OF JURISDICTION

The District Court for the Northern District of California had jurisdiction under 18 U.S.C. 3231 to consider Zavalidroga's Petition for a Mandamus Review on December 11, 2003.

The Ninth Circuit Court of Appeals thereafter had jurisdiction under 28 U.S.C. 1291. The Ninth Circuit denied a rehearing of Appeal #04-10019 on August 23, 2004. The denial date of a rehearing began the 90-day period for filing a petition for certiorari under Supreme Court Rule 13 (1).

The jurisdiction of the United States Supreme Court is based on 28 U.S.C. 1254.

## STATEMENT OF STATUTES AND CONSTITUTIONAL PROVISIONS

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) - Title I - Habeas Corpus Reform, Section 105 Amendments, added a statute of limitations to 28 U.S.C 2255. The provision states in pertinent part:

A one-year period of limitations shall apply to a motion under this section. The limitation period shall run from the latest of --

1) the date on which the judgment of conviction becomes final;

2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(end of statute)

## STATEMENT OF THE CASE

At a jury trial in federal court for the Northern District of California in 1996, the verdict (CR32) found Defendant Zavalidroga not guilty of Count One, mailing a threatening communication in violation of 18 U.S.C. 876; and guilty of Count Two, leaving a threatening voice message on a telephone-answering machine in violation of 18 U.S.C. 875.

At each of a series of sentence hearings (CR 48, CR 63, CR 66, CR 70), the defendant explained in great detail that the Government prosecutor had unethically manipulated the sounds which were on the tape-recorded trial evidence, and that the defendant's ineffective public defender had repeatedly refused during the trial to raise the tampered trial-evidence issue. The Government prosecutor steadfastly insisted at each sentencing that the tape-recorded evidence had not been altered. The sentencing court (CR 48, CR 63, CR 66, CR 70) stated that it would not permit Zavalidroga's conviction to remain standing in the face of any Government alterations to the tape-recorded trial evidence.

At final sentencing (CR70), the district court promised the defendant that a special appellate attorney

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footnote: "CR" refers to the Clerk's Record on the trial-court docket sheet.

would be appointed to appeal the issue of prosecutorial tampering with the tape-recorded trial evidence. Unknown to the defendant at this time of final sentencing, the entire appeal process had already been arranged as a perverse fraud in which the appointed appellate attorney had conspired to deliberately lose his own case by concocting any fraud necessary to ascertain that the claim of tampered tape-recorded evidence would never be presented in any appeal.

During the next 20 months, the appellate attorney's communications to the defendant included the major fraud of: a phony trial-evidence-procurement agreement with the Government in which the appellate attorney's own chosen expert, who was in reality an imaginary expert concocted by the appellate attorney, had evaluated the tape-recorded evidence. The appellate attorney had perpetuated his frauds to lose his own case with the specific intent that no reasonable amount of defendant's "due diligence" would be expected to uncover the direct-appeal fraud soon enough to have filed an in-time pro se 2255 motion to raise the fraud.

When the defendant discovered his appellate attorney's fraud, the defendant immediately compiled all the relevant attorney-client-correspondence documentation and mailed it with a letter of injustice to the district court (CR 89). The district court, in a series of four orders (Appendices J, I, G, C), has subsequently denied any relief while the defendant has presented a series of progressive arguments that the appellate-attorney fraud warrants relief.

When Zavalidroga submitted his first appeal to the Ninth Circuit #00-10324 (Appendix H), the defendant's custodial sentence had already expired. In this first appeal,

the defendant argued that his case should be reopened by mandamus authority under 28 U.S.C. 1651. See United States v. Morgan, 346 U.S. 502 (1954) (deciding that when a defendant's custody expires, 28 U.S.C. 2255 must be converted into 28 U.S.C. 1651 because Section 2255 contains a jurisdictional in-custody requirement). This first Ninth Circuit Memorandum (Appendix H) noted that Zavalidroga, during the time while he had previously been in custody, had not filed a motion under 28 U.S.C. 2255(1) within one year of the date when his conviction became final.

Thereafter, in the second Ninth Circuit Appeal #01-10432, the defendant argued that coram nobis 28 U.S.C. 1651 should be granted because he would be eligible for an out-of-time 28 U.S.C. 2255 motion if he still remained in custody. This second Ninth Circuit Memorandum #01-10432, at 2, (Appendix F) denied relief upon the basis that "a petitioner may not resort to coram nobis merely because he has failed to meet the AEDPA's gatekeeping requirements".

The defendant further continued to contend in this second appeal's attendant Petition For A Rehearing #01-10432 that he had in fact always previously met the AEDPA's gatekeeping requirement. Petitioner contended that the prior one-year filing period for a pro se 28 U.S.C. 2255 motion should not begin, as was decided by the first Ninth Circuit Memorandum (Appendix H), one year from 2255(1) ". . .the date on which the judgment of conviction became final". The defendant contended that his one-year filing period for a pro se 2255 motion correctly began under 2255(4) at the moment 20 months after the conviction became final, which was when the defendant's due diligence had first been able to discover his appellate attorney's fraud.

Section 2255(4) plainly states that, "The limitation period shall run from the latest of - - ". . .the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence". (Refer to page ix herein for Petitioner's Statement of Statutes and Constitutional Provisions). No court in Zavalidroga's case can possibly determine the timeliness of Section 2255(4) without firstly providing the court's explanation, in consideration of established benchmark precedents, as to how and when Zavalidroga's "due diligence" could have discovered his attorney's fraud of deliberately losing his own case. The Ninth Circuit (Appendix E) without commentary denied the Rehearing Petition #01-10432.

The first and second Ninth Circuit memorandums had both denied relief without making a single word of commentary as to Zavalidroga's claims that Section 2255, both before and after the passage of AEDPA, has always been an equitably tollable statute under circumstances of appellate attorney fraud. After the second Ninth Circuit appeal, Zavalidroga petitioned to the Supreme Court for a writ to force the Ninth Circuit to concede that not only is AEDPA 2255(4) equitably tollable; but that 2255(4) should also be equitably tolled in Zavalidroga's case. The Supreme Court denied certiorari (Appendix D, Supreme Court Docket #03-299).

Subsequently, in a third Ninth Circuit appeal (Appendix B), the defendant argued, to refute the Ninth Circuit's second Memorandum Opinion (Appendix F), that the out-of-custody defendant had never resorted to coram nobis as a remedy for in some way having failed to meet AEDPA's gatekeeping requirements while he was still in

Section-2255 custody. Even if Zavalidroga was still in custody, Section 2255 would have always been equitably tolled in his case. Zavalidroga's third appeal argues that Statute 2255(4) always tolls AEDPA when "...the appellate attorney himself is shown to have deliberately dropped the ball by actively and purposefully functioning as an agent in some sort of scheme or confidence game which was intended to trick the unwitting defendant into not discovering ineffective assistance of counsel on a direct appeal of right".

In support of his third-appeal argument, Zavalidroga cited equitable-tolling 28 U.S.C. 2255(4) precedents from as many circuits as possible, including but not limited to: Manning v. Foster, 224 F.3d 1129 (9th Cir. 2000); Aron v. United States, 291 F. 3d 708 (11th Cir 2002); Wims v. United States, 225 F. 3d 186 (2nd Cir. 2000); United States v. True, 164 F. Supp. 2d 1128 (D. Minn. 2001); Dumas v. Kelly, 162 F. Supp. 2d 170 (E.D.N.Y. 2001); etc. .

The basis of these equitable-tolling precedents can be derived, as the Ninth Circuit derived in Manning v. Foster, supra, from Holmberg v. Armbrecht, 327 U.S. 392 (1945) (statutes of limitations are not controlling measures of equitable relief, but have been drawn upon by equity solely for the light they may shed in determining that which is decisive for the chancellor's intervention).

It was at this chronological point of Zavalidroga's third appeal that the Government, for the first time, now proffered its "law of the case" defense to prevent Zavalidroga from explaining the supporting claim of equitable tolling of AEDPA Section 2255(4) in support of his Section 1651 claim of attorney fraud.

## AMPLIFICATION OF REASONS FOR THE WRIT

The rules of comity firstly suggest that any Government "law of the case" defense was waived long before the time of Zavalidroga's third Ninth Circuit appeal.

Secondly, rather than being left open to a court's discretionary powers, Congress has decreed by statute as to which 28 U.S.C. 2255 subsection commences the final-most tolling date for AEDPA. The Ninth Circuit will not acknowledge the Congressional intent that 2255(4) must, by statutory design, override prior case determinations which have been made under 2255(1). Neither "law of the case" nor any court's desire for uniformity can ever overrule a Congressional statute.

Thirdly, the Ninth Circuit has elided the enormous block of Supreme Court precedents for the federal miscarriage-of-justice rule which pertains to the narrow category of habeas petitioners in Zavalidroga's situation who are seeking to prove their actual innocence.

## LEGAL ARGUMENT

### 1. The Government waived its "law of the case" defense at the time of the second occasion when Zavalidroga argued his claims

Zavalidroga submitted to the district court two successive mandamus petitions to have his case reopened (Appendices J and I). Even at the time of Zavalidroga's first Ninth Circuit appeal #00-10324 (Appendix H), which resulted from the denial of the second mandamus petition to the district court, the Government could have raised its "law of the case" defense that the district court had already twice decided Zavalidroga mandamus claim. Instead, the Government waived its "law of the case" defense in district court proceedings by not presenting the defense in the first Ninth Circuit appeal (Appendix H).

The Government then later also waived its "law of the case" argument in Ninth Circuit appellate proceedings. After the Ninth Circuit had decided the above-mentioned first appeal #00-10324 (Appendix H), Zavalidroga filed yet another district court petition (Appendix G) which developed into the second Ninth Circuit Appeal #01-10432 (Appendix F). At the time of the second Ninth Circuit appeal (Appendix F), the Government should have raised a "law of the case" defense that the Ninth Circuit had already decided Zavalidroga's claim in the first Ninth Circuit Appeal (Appendix H). Instead, the Government chose to argue the second appeal upon the merits of determining whether the Ninth Circuit should grant coram nobis in lieu of an out-of-time 2255 motion.

The Government's failure to raise a "law of the case" defense at the moment of a second proceeding on the same habeas claim should forever-after preclude the Government from raising its "law of the case" argument in future proceedings on the same claim. Burris v. Parke, 95 F.3d 465 (7th Cir. en banc, 1996) (The defendant filed a motion to attack only his conviction. After the conviction-attacking habeas motion was denied, the defendant filed a second habeas motion which attacked only his sentence. The State's defense of "law of the case" had been waived at the moment of the State's silence during the first petition as to the implications of filing a second petition.).

Trest v. Cain, Warden, 522 U.S. 87 (1997) (A court of appeals is not "required" to raise the issue of procedural default sua sponte. In the habeas context, procedural default is normally a "defense" that the State is "obligated to raise" and "preserve" if it is not to "lose the right to assert the defense thereafter".).

2. "Law of the case" does not exist as some sort of inescapable judicial doctrine

The Supreme Court's long-standing precedent for "law of the case" has been Messenger v. Anderson, 225 U.S. 436, 444 (1912) ("In the absence of statute the phrase, law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power."). The Ninth Circuit, however, has elided that Zavalidroga's

claim for the equitable tolling of AEDPA is not absent of statute. There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted; Mobil Oil Corp. v. Higginbotham, Administratrix, 436 U.S. 618, 625-626 (1978) (a court has no authority to substitute its views for those expressed by Congress in a duly enacted statute).

Congress authored the opening phrases of AEDPA's Section 105 Amendments as follows: "A one-year statute of limitations shall apply to a motion under this section. The limitation period shall run from the latest of - -". Congress clearly decreed that it is inherent within the statute itself, rather than left open to the discretionary powers of a court, as to which 2255 subsection commences the tolling date for AEDPA. Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985) (The task of resolving the dispute over the meaning of a statute begins with the language of the statute itself.). United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241-242 (1989) (The language of a statute expresses Congress' intent.).

The precise Congressional intent of 2255(4) is clearly to provide an overriding provision for any prior determinations in the same case which have already been made as to 2255(1). The first and second Ninth Circuit Memorandums have adjudicated Zavalidroga's case under only 2255(1), an instance in which "law of the case" might bar the relitigation of 2255(1). However, neither of the first two Ninth Circuit Memorandums ever adjudicated Zavalidroga's instant claim of 2255(4); therefore 2255(4) should not fall inside a Government defense that "law of the case" as to 2255(1) bars relitigation of the never-litigated 2255(4) claim.

For any rule of law to be valid, the rule must be subordinated to impartial and well-defined principles of law. The decision as to which 28 U.S.C. 2255 subsection correctly begins the tolling date of AEDPA has been clearly mandated by Congress, and not left to the discretion of a court. Caminetti v. United States, 242 U.S. 470, 471 (1916) ("When the language of a statute is plain and does not lead to absurd or impracticable results, there is no occasion or excuse for judicial construction; the language must then be accepted by the courts as to sole evidence of the legislative intent, and the courts have no function but to apply and enforce the statute accordingly."). United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371 (1987) (a provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes its meaning clear).

Zavalidroga's case is further unique in that even if "law of the case" could be applied to Zavalidroga's 2255(4) claim, the Supreme Court still has jurisdiction to prevent the miscarriage of justice which has resulted in the conviction of an innocent person in Zavalidroga's out-of-custody case. Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 817 (1988) (the Supreme Court is not bound by law-of-the-case decisions from lower courts). Panama Railroad Company v. Napier Shipping Company, 166 U.S. 280 (1897) (a petition for writ of certiorari exposes the entire case to review).

3. The Supreme Court has developed the federal miscarriage-of-justice rule for those habeas petitioners who are seeking to prove their factual innocence

Providing support for the fundamental miscarriage-of-justice rule is Murray, Director, Virginia Department of Corrections v. Carrier, 477 U.S. 478, 492-497 (1986) (in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default). Also Schlup v. Delo, Superintendent, Potosi Correctional Center, 513 U.S. 298 (1995) (deciding that when a petitioner presents evidence so strong that a court can not have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to argue the merits of his underlying claims).

The passage of AEDPA in 1996 did not nullify the federal miscarriage-of-justice rule which pertains to those defendants who are seeking to prove their actual innocence; Bousley v. United States, 523 U.S. 614, 623-624 (1998) ("To establish actual innocence, a petitioner must demonstrate that, "in light of all the evidence", "it is more likely than not that no reasonable juror would have convicted him".).

The Supreme Court's classic case of a layman defendant who was not able to develop all the facts of a claim in a prior habeas petition is Price v. Johnston, 334 U.S. 266, 291 (1948) (The pro se petitioner required four successive petitions to fully develop all the facts of his habeas claim. Additionally noting that, "The primary purpose of a habeas corpus proceeding is to make certain that a man is not

unjustly imprisoned. And if for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief."). Also extant is the pro se petitioner in Rice v. Olson, Warden, 324 U.S. 786, 792 (1945) ("A petition for habeas corpus ought not to be scrutinized with technical nicety. Even if it is insufficient in substance, it may be amended in the interest of justice".).

Smith v. Yeager, Warden, 393 U.S. 122 (1968) ("The essential question in a subsequent habeas corpus proceeding (to which the usual principles of res judicata do not apply and regardless of waiver standards in other circumstances) is whether the petitioner in the prior proceeding "deliberately withheld the newly asserted ground or otherwise abused the writ."). Also Sanders v. United States, 373 U.S. 1 (1963) (providing the Supreme Court's guidelines as to successive habeas petitions, and noting at 8, "If government is always to be accountable to the judiciary for a man's imprisonment, access to the courts on habeas must not be thus impeded. The inapplicability of res judicata to habeas, then, is inherent in the very role and function of the writ". Also noting at 16-17, that even if the same ground was rejected on the merits on a prior application, it is open to the applicant to show that the ends of justice would be served by permitting the redetermination of the ground).

During the time while Zavalidroga was still in Section-2255 custody, there is no doubt whatsoever under the AEDPA provisions of 2255(4), that Zavalidroga's claim of attorney fraud should never have been incorrectly construed as time-barred under 2255(1). There is additionally no doubt whatsoever that once Zavalidroga was out-of-2255 custody

and simultaneously presenting his Ninth Circuit appeals under Section 1651 jurisdiction, that Zavalidroga has fully complied under the now-applicable Section 1651 filing requirements to raise the supporting claim of AEDPA 2255(4) in support of his Section 1651 mandamus claims of attorney fraud. Slack v. McDaniel, Warden, 529 U.S. 473 (2000) (discussing successive habeas petitions under AEDPA requirements of 28 U.S.C. 2254; while noting at 474, "When Congress instructs that application of a statute is triggered by the commencement of a case, the relevant case for a statute directed to appeals is the one initiated in the appellate court."). Also Sibron v. State of New York, 392 U.S. 40 (1968) (mere release from custody does not moot a defendant's conviction).

The Supreme Court's precedent for second-and-successive-habeas-petition doctrine has been McCleskey v. Zant, Superintendent, Georgia Diagnostic and Classification Center, 499 U.S. 467 (1991) (deciding the proper standard for applying abuse-of-the-writ doctrine in habeas cases). McCleskey, at 468, notes that interference by officials is just cause for not raising a claim in a prior petition. McCleskey, at 468, 489-497, further elucidates that even if a defendant can not show cause, the failure to earlier raise the claim may nonetheless be excused if he can show that a fundamental miscarriage of justice – the conviction of an innocent person – would result from a failure to entertain the claim.

The precedent terminology of "ends of justice" is elucidated by Kuhlman, Superintendent, Sullivan Correction Facility v. Wilson, 477 U.S. 436 (1986) (defining the circumstances under which federal courts should entertain a habeas corpus petition that raises claims rejected on a prior petition for the same relief, and noting at 454, that the "ends

of justice" requires federal courts to entertain petitions only where the prisoner supplements his constitutional claim with a colorable claim of factual innocence).

In Zavalidroga's case, both of the district court factfinders, namely Trial Judge Hon. Stanley Weigel and Sentencing Judge Hon. Maxine Chesney, have fully elaborated during court minutes (CR48, CR63, CR66, CR70) that the district court would never permit Zavalidroga's conviction to remain standing in the face of any tampering or manipulation to the tape-recorded trial evidence. Engle, Correctional Superintendent v. Isaac, 456 U.S. 107, 109, 134-135 (1981) (A plain-error standard is unnecessary to correct miscarriages of justice. Victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard.). Any appellate court in Zavalidroga's case would be ignoring the dictates of the clearly-erroneous standard if it ever engaged in impermissible factfinding as to Zavalidroga's factual innocence; Amadeo v. Zant, 486 U.S. 214, 221-223 (1988) (a federal appellate court may set aside a trial court's factfindings only if they are "clearly erroneous" and must give due regard to the trial court's opportunity to judge the credibility of the witness).

No court is authorized to ignore the main body of statutes, rules, and precedents. The Ninth Circuit's disregard firstly for Statute 2255(4) and secondly for the Supreme Court's numerous precedents which have developed the federal miscarriage-of-justice rule is particularly egregious in light of the fact that the element of an appellate attorney's fraud to deliberately lose his own case seems to always be a major factor in virtually every Ninth Circuit case in which a criminal-conviction reversal is at stake.

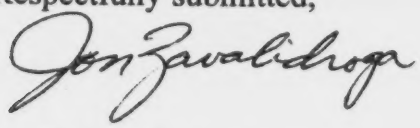
Not a single one of the "law of the case" circuit precedents which was cited by either the Government-Appellee Brief #04-10019 or by the Ninth Circuit Memorandum #04-10019 (Appendix B) was cited within the proper case-specific circumstances of Zavalidroga's case. The Ninth Circuit has elided the "manifest injustice" exception which pertains to all law-of-the-case precedents in which a habeas petitioner is seeking to prove his factual innocence. Zavalidroga has pointed out in Appeal #04-10019, that all contemporary circuit-court "law of the case" precedents, including the Ninth Circuit Memorandum #04-10019 (Appendix B) citation of United States v. Alexander, 106 F.3d 874 (9th Cir. 1997), contain a stipulation for the "clearly erroneous" and "manifest injustice" exceptions to the law of the case.

Zavalidroga's herein Petition for Certiorai presents a long line of Supreme Court precedents which develop the entire doctrine as to second and successive habeas petitions from defendants who are seeking to prove factual innocence. Zavalidroga's case is most certainly deserving of the equity principles which have been developed by the Supreme Court for the federal miscarriage-of-justice rule. Missouri v. Jenkins, 515 U.S. 70, 127 (1995) (courts of equity must be governed by rules and precedents no less than the courts of law); Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975) (Congress' purpose in vesting a variety of "discretionary" powers in the courts was not to limit appellate review of trial courts, or to invite inconsistency and caprice, but rather to make possible the fashioning of the most complete relief possible.).

## CONCLUSION

The district court has stated that it will not accept future petitions from Zavalidroga. A fundamental miscarriage of justice - the conviction of a defendant who is actually innocent - can be prevented only if the Supreme Court issues a writ to entertain the defendant's supporting claims that AEDPA is always equitably tolled in circumstances of appellate-attorney frauds.

Respectfully submitted,



Jon Zavalidroga, pro se

Filed August 23, 2004

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, No. 04-10019

Plaintiff-Appellee, D.C. No. CR-96-146 MMC
Northern California

v.

JON ZAVALIDROGA ORDER

Defendant-Appellant.

Before: LEAVY, THOMAS, and FISHER, Circuit Judges

Judges Thomas and Fisher have voted to deny appellant's petition for panel rehearing and petition for rehearing en banc, and Judge Leavy so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. See Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

FILED JUN 22, 2004

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, No. 04-10019

Plaintiff-Appellee, D.C. No. CR-96-146-MMC

v.

JON ZAVALIDROGA, MEMORANDUM *

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Submitted June 15, 2004**

Before: LEAVY, THOMAS, and FISHER, Circuit Judges

Jon Zavalidroga appeals pro se the district court's denial of his "Petition for a Mandamus Review of Previous District Court Orders and Their Ninth Circuit Affirmations." We affirmed on direct appeal Zavalidroga's conviction and

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

sentence for transmitting a threatening communication in interstate commerce. United States v. Zavalidroga, No. 97-10290, 1998 WL 403361 (9th Cir. July 7, 1998) (memorandum). We affirmed the denial of his mandamus petition to reopen criminal proceedings, holding that the sole mechanism for challenging his federal detention would have been a motion pursuant to 28 U.S.C. 2255, but that the statute of limitations had expired. United States v. Zavalidroga, No. 00-10324, 2001 WL 68337 (9th Cir. Jan. 24, 2001) (memorandum). We affirmed the denial of Zavalidroga's coram nobis petition, holding that he could not circumvent 2255's statute of limitations by filing a coram nobis petition. United States v. Zavalidroga, No. 01-10432, 2002 WL 31761788 (9th Cir. Dec. 9, 2002) (memorandum). He then filed his mandamus petition, arguing that due to fraud by his attorney on direct appeal, relief was not barred by 2255's statute of limitations. Zavalidroga's arguments are barred by law of the case. See United States v. Alexander, 106 F.3d 874,876 (9th Cir. 1997). Accordingly, we affirm the district court's order.

AFFIRMED.

Filed December 11, 2003

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, No. CR 96-0146MMC

Plaintiff,

v.

JON ZAVALIDROGA,

Defendant

/

ORDER DENYING DEFENDANT'S PETITION FOR MANDAMUS REVIEW OF PREVIOUS DISTRICT COURT ORDERS AND NINTH CIRCUIT AFFIRMANCES

The Court is in receipt of defendant's Jon Zavalidroga's petition, filed December 10, 2003, titled "Petition for a Mandamus Review of Previous District Court Order and Their Ninth Circuit Affirmative."

The Ninth Circuit having affirmed the Court's previous orders, the petition is hereby DENIED. No further filings shall be accepted in this closed case.

IT IS SO ORDERED.

Dated: December 11, 2003

"s/ Maxine Chesney"
United States District Judge

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

October 6, 2003

Mr. Jon Zavalidroga
3263 Forward Rd.
Blossvale, NY 13308

Re: Jon Zavalidroga
v. United States
No. 03-299

Dear Mr. Zavalidroga:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

William K. Suter, Clerk

Filed July 8, 2003

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

United States,
Plaintiff-Appellee,

v.

Jon Zavalidroga,
Defendant-Appellant.

No. 01-10432
D.C. No.
CR-96-00146-MMS
Northern California
(San Francisco)

ORDER

Before: GOODWIN, TROTT, and GRABER,
Circuit Judges

Appellant's petition for panel rehearing is denied. See Fed.R.App.P.40. No further filings shall be accepted in this closed appeal.

Filed December 9, 2002

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

United States,
Plaintiff-Appellee,

v.

Jon Zavalidroga,
Defendant-Appellant.

No. 01-10432
D.C. No.
CR-96-00146-MMS

MEMORANDUM*

Appeal from the United States District Court for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Submitted December 2, 2002 **

Before: GOODWIN, TROTT, and GRABER,
Circuit Judges

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed.R App.P. 34(a) (2).

Former federal prisoner Jon Zavalidroga appeals pro se the district court's denial of his petition for writ of coram nobis, challenging his conviction for transmitting a threatening communication in interstate commerce in violation of 18 U.S.C. 875(c). We have jurisdiction pursuant to 28 U.S.C. 1291. Reviewing de novo, see United States v. Walgren, 885 F2d 1417, 1420 (9th Cir. 1989), we affirm.

Zavalidroga contends that the district court erred in denying his writ for coram nobis as time-barred under 28 U.S.C. 2255, because he has never attacked his conviction pursuant to a 2255 motion in the district court.

In this case, Zavalidroga raises the same claims he previously raised in a time-barred writ of mandamus while he was in federal custody.1 Because Zavalidroga may not now circumvent 2255's statute of limitations by filing a writ of coram nobis, the district court properly denied the instant writ. Matus-Leva v. United States, 287 F.3d 758, 761 (9th Cir.) (stating that a "petitioner may not resort to coram nobis merely because he has failed to meet the AEDPA's gatekeeping requirements."), cert. denied, 2002 WL 31308857 (November 12, 2002).

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1 United States v. Zavalidroga, No. 00-10324, 2 Fed. Appx. 787, 2001 WL 68337, at *1 (9th Cir. 2001) (memorandum) (deciding that it would be futile to construe Zavalidroga's petitions as motions under 2255 because the statute of limitations had expired).

To the extent Zavalidroga alleges that he did not file a timely petition because he relied on his appellate counsel's promise to file a 2255 motion on his behalf, this claim fails. See Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (recognizing that a prisoner does not have a constitutional right to counsel on collateral review); see also Wainwright v. Torna, 455 U.S. 586, 587-588 (1982) (per curiam) (deciding that a prisoner could not be deprived of effective assistance of counsel during a proceeding where there is no constitutional right to counsel).

AFFIRMED.

Filed July 9, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,

v. No. CR-96-0146MMC

JON ZAVALIDROGA,
Defendant

ORDER DENYING DEFENDANT'S PETITION FOR WRIT OF CORAM NOBIS

/

(Docket #106)

The Court is in receipt of defendant Jon Zavalidroga's petition, filed April 20, 2001, entitled Petition for District Court to Grant Defendant Zavalidroga's Application to the Ninth Circuit Court of Appeals for a Writ of Coram Nobis and a New Trial. In the instant petition, defendant contends that his appellate attorney provided ineffective assistance of counsel by not raising on direct appeal the issue of whether "tampered tape-recorded trial evidence" was offered against defendant at his criminal trial. (See Def's Petition at 3.)

Defendant further contends that he cannot raise this issue in a motion to vacate or set aside his sentence pursuant to 28 U.S.C. 2255 as he is no longer in custody. 1

"[A] petitioner must show the following to qualify for coram nobis relief: (1) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III; and (4) the error is of the most fundamental character." Hirabayashi v. United States, 828 F.2d 591, 604 (9th Cir. 1987).

Defendant cannot establish the second element set forth in Hirabayashi as defendant has already attacked his conviction by raising the very claim presented in the present petition. Specifically, in his petition for a writ of mandamus filed May 24, 2000, defendant contended that his appellate attorney did not include the "physical taped-evidence tampering [issue] in his submitted appeal," (see Mandamus petition, filed May 24, 2000, at 4), and that "[c]ounsel's blatant disregard for setting out the claims of the defendant in the appeal constituted ineffective assistance of counsel." (Id.) After this Court denied defendant's petition for a writ of

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1 On June 19, 1997, following defendant's conviction for violation of 18 U.S.C. 875(c) defendant was sentenced to a ninety-day prison term and a three-year term of probation. (See Judgment, filed June 19, 1997.) Defendant's probationary term has now expired.

mandamus, (see Order Denying Writ of Mandamus, filed June 1, 2000), the Ninth Circuit affirmed, concluding that it would be futile to construe defendant's May 24, 2000 petition as a motion to vacate, set aside or correct his sentence pursuant to 2255 because any such action would be untimely. (See Memorandum, filed January 24, 2001.)

The Ninth Circuit has concluded that the claim raised in the present petition was time-barred when brought in May 2000; defendant may not circumvent that ruling by merely re-alleging the same claim in a petition for a writ of coram nobis. Accordingly, defendant's petition for a writ of coram nobis is hereby DENIED.

This order resolves docket #106.

IT IS SO ORDERED.

Dated: July 9, 2001

"s/ Maxine Chesney"
United States District
Judge

Filed January 24, 2001

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA, No. 00-10324

Plaintiff-Appellee, D.C. No. CR-96-00146-MMC

v. MEMORANDUM 1

JON ZAVALIDROGA,

Defendant-Appellant.

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Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Submitted January 8, 2001 2

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1. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

2. The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Before: BEEZER, O'SCANNLAIN and KLEINFELD, Circuit Judges.

Jon Zavalidroga ("Zavalidroga") appeals pro se from the orders of the district court denying his petition for a writ of mandamus to compel the district court to reopen his federal criminal conviction, and his petition to provide a review of his appeal from the judgment of conviction. In 1997 Zavalidroga was convicted of transmitting a threatening communication in interstate commerce under 28 U.S.C. 875(c). His conviction was affirmed by this court on July 7, 1998. Zavalidroga argues that the district court erred in refusing to conduct an inquiry into the possibility of judicial fraud in the handling and presentation of a tape recording of a telephone call. We affirm because we conclude that the district court did not abuse its discretion in denying the petitions.

A peremptory writ of mandamus is traditionally used to compel a district court to exercise its authority. Will v. United States, 389 U.S. 90, 95 (1967). "The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute." Pennsylvania Bureau of Correction v. U.S. Marshals Service, 474 U.S. 34, 43 (1985). A petition filed pursuant to 28 U.S.C. 2255 "provides the exclusive procedural mechanism by which a federal prisoner may test the legality of his detention." Lorensten v. Hood, 223 F.3d 950, 953 (9th Cir. 2000)(citing United States v. Pirro, 104 F.3d 297, 299 (9th Cir. 1997)).

We also note that it would have been futile for the district court to construe Zavalidroga's petitions as motions to vacate, set aside or correct his sentence because he did not comply with the filing procedures mandated by 28 U.S.C. 2255. Zavalidroga's one-year time period for filing such a motion expired on July 7, 1998, long before he filed his

mandamus petitions in April and May of 2000. 28 U.S.C. 2255(1); United States v. Garcia, 210 F.3d 1058, 1058 (9th Cir. 2000).

AFFIRMED.

Filed June 1, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

UNITED STATES OF AMERICA, No. CR-96-0146-MMC

Plaintiff, ORDER DENYING WRIT OF MANDAMUS

v.

JON ZAVALIDROGA,

Defendant

_____/

On May 24, 2000, defendant Jon Zavalidroga filed a "Mandamus to Compel the Court to Provide a Review of the Appeal for Case #CR-96-0146 MMC." The Court construes this as a petition for writ of mandamus. In said petition, defendant contends that he has "continuously maintained to the courts and to all parties of record that the prosecution achieved [his] conviction entirely pursuant to high-technology professional alterations made surreptitiously to the sound on the tape-recorded trial evidence." Pet. at 1.

On April 24, 2000, defendant filed a similar paper entitled: "Mandamus to Compel the District Court to Reopen Case." Defendant's April 24, 2000 petition was denied by the Court by order dated May 3, 2000. The Court explained in its May 3, 2000 order:

A writ of mandamus is a drastic remedy to be used only in extraordinary circumstances. See Kerr v. United States Dist. Court, 426 U.S. 394 (1976). Mandamus relief is only available to compel an officer of the United States to perform a duty if: (1) the party's claim is clear and certain; (2) the duty is ministerial and so plainly prescribed as to be free from doubt, and (3) no other adequate remedy is available. See Fallini v. Hodel, 783 F.2d 1343, 1345 (9th Cir. 1986) (citations omitted). The party seeking mandamus carries the heavy burden of showing all three criteria are met. See Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980).

Here, as with defendant's previous petition, defendant has failed to make the required showings. Accordingly, the Court hereby DENIES the petition for a writ of mandamus.1

IT IS SO ORDERED.

Dated: June 1, 2000

"s/ Maxine M. Chesney"
United States District
Judge

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1 The Court notes that a defendant seeking to collaterally challenge a conviction may file a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. 2255. Section 2255 motions, however, are subject to a one-year statute of limitations period and it appears that more than one year has elapsed since defendant's judgment became final.

Filed May X 3, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,

v. No. CR-96-0146MMC

JON ZAVALIDROGA,
Defendant

ORDER DENYING
WRIT OF MANDAMUS

/

On April 24, 2000, defendant Jon Zavalidroga filed a "mandamus to compel the district court to reopen case."

A writ of mandamus is a drastic remedy to be used only in extraordinary circumstances. See Kerr v. United States Dist. Court, 426 U.S. 394 (1976). Mandamus relief is only available to compel an officer of the United States to perform a duty if: (1) the party's claim is clear and certain; (2) the duty is ministerial and so plainly prescribed as to be free from doubt; and (3) no other adequate remedy is available. See Fallini v. Hodel, 783 F.2d 1343, 1345 (9th Cir. 1986) (citations omitted). The party seeking mandamus carries the heavy burden of showing all three criteria are met. See Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980). Here defendant has failed to make the required showings. Accordingly, the Court hereby DENIES his petition for a writ of mandamus.

IT IS SO ORDERED.

"s/ Maxine Chesney"
MAXINE M. CHESNEY
United States District Judge

Dated: May X 3 2000

PROOF OF SERVICE - SUPREME COURT RULE 29 (5)

STATE OF NEW YORK :
SS.
COUNTY OF ONEIDA :

JON ZAVALIDROGA, being duly sworn, deposes and says: that deponent is the Petitioner in this action.

That on the 5TH day of NOVEMBER, 2004 deponent served the within Petition For Writ of Certiorari upon (1) Karen Beausey, U.S. Attorney's Office, 450 Golden Gate Avenue, P.O.B. 36055, San Francisco, California 94102 and (2) Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001 and (3) Honorable Maxine Chesney, United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California 94102, the address designated by said parties for that purpose, by mailing three true copies of same by certified mail, return receipt requested, enclosed in a postpaid properly addressed wrapper, in an office depository under the exclusive care and custody of the United States post office department within the State of New York.

Jon Zavalidroga

Jon Zavalidroga, pro se

Sworn to before me this
5TH day of NOVEMBER, 2004.

Vito Piemonte

Notary Public, Oneida County, NY
My Commission Expires: 3/31/05

VITO PIEMONTE
No. 4844231
Commission Expires On 3/31/05
Qualified in Oneida County